IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

THE AMERICAN BOTTLING COMPANY, A DELAWARE CORPORATION, Plaintiff, v. CRESCENT/MACH I PARTNERS, L.P.; JEFFERIES & CO., INC.; TCW SHARED OPPORTUNITY FUND II, LP; SHARED OPPORTUNITY FUND IIB LLC; TCW/CRESCENT MEZZANINE INVESTMENT PARTNERS, L.P.; TCW/CRESCENT MEZZANINE PARTNERS, L.P.; TCW/CRESCENT MEZZANINE TRUST; TCW LEVERAGED INCOME TRUST, L.P.; TCW LEVERAGED INCOME TRUST II, L.P.; RICHARD HANDLER, Defendants.	)	C.A. No. 09C-02-134 WCC

Submitted: June 24, 2009
Decided: September 30, 2009

OPINION

On Defendant's Motion to Dismiss
DENIED IN PART. GRANTED IN PART.

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CARPENTER, J.

Overview

Before this Court is Crescent/Mach I Partners, L.P.'s, Jefferies & Co., Inc.'s, TCW Shared Opportunity Fund II, LP's, Shared Opportunity Fund IIB LLC's, TCW/Crescent Mezzanine Investment Partners, L.P.'s, TCW/Crescent Mezzanine Partners, L.P.'s, TCW/Crescent Mezzanine Trust's, TCW Leveraged Income Trust, L.P.'s, TCW Leveraged Income Trust II, L.P.'s, Brown University's, and Richard Handler's (collectively, "Crescent" or "Defendants") Motion to Dismiss Plaintiff American Bottling Company's ("Bottling" or "Plaintiff") Complaint. For the reasons set forth below, this Court hereby denies the motion as to the mutual mistake and unilateral mistake claim and grants the motion as to the unjust enrichment claim.

Facts

On October 8, 1999, Bottling acquired Dr Pepper Bottling Holdings, Inc. for $25 per share. In connection with the acquisition, two separate suits were filed with the Court of Chancery by holding shareholders. The first action alleged a breach of fiduciary duties by certain directors in approving the merger and the second claim was brought under 8 *Del. C.* § 262 seeking an appraisal of the fair value of shares at the time of the acquisition. On May 2, 2007, the Chancery Court issued its opinion on both claims. The fiduciary duty action was dismissed; as to the appraisal action, the Court concluded the fair value of shares at the time of the acquisition to be $32.31 per share, $7.31 over the valued amount at the time of the acquisition.

On June 1, 2007, Bottling and Crescent signed a letter ("Settlement Agreement") that memorialized a May 25, 2007 conversation between the parties. The Settlement Agreement "fully and finally resolved" the appraisal action and set forth (I) the total amount owed to Crescent pursuant to the Chancery Court's opinion, including interest and costs, (ii) the logistics for payment to Crescent, and (iii) both parties acknowledgment that neither party would file an appeal, so delayed payment was unnecessary.[1] Bottling was unaware of the material miscalculations in the Chancery Court's opinion at the time of the signing. On June 6, 2007, pursuant to this agreement, Bottling wired $47,480,676.30 to Crescent.

In August 2007, a third-party alerted Bottling that the Chancery Court's opinion contained two computational errors, which caused the Court to overstate the fair value of the shares by $2.27 per share. These errors were subsequently confirmed by Bottling experts in the case and on September 20, 2007, Bottling filed a motion in Chancery under Rule 60(a) requesting a correction in the calculations. Chancery determined that the errors fell within the scope of Rule 60(a) and amended its opinion to reflect the correct share amount.

Crescent filed a timely appeal, and on December 1, 2008, the Supreme Court of Delaware reversed the Chancery Court's Rule 60(a) decision. The Supreme Court

[1] *See* Compl. Ex. B at 1.

concluded that the "settlement agreement superseded [Chancery's] appraisal opinion as the document that controlled the relationship between the parties," as such, "a change in the appraisal opinion could have no legal effect, unless and until Bottling first obtained a judicial rescission of the settlement agreement."[2] A rescission of the Settlement Agreement was not obtained prior to the Chancery Court's final decision on the Rule 60(a) motion and therefore the agreement controlled.

Standard of Review

A motion to dismiss must be decided solely upon the allegations set forth in the complaint.[3] The Court accepts all well-pleaded allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff.[4] The complaint will only be dismissed where the Court finds that the plaintiff has failed to plead facts supporting an element of the claim or that under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted.[5]

Discussion

A. Mutual Mistake

The Restatement (Second) of Contracts test for mutual mistake is followed by

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[2] *See* Compl. Ex. D at 8.
[3] *See Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988).
[4] *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).
[5] *See Luscavage v. Dominion Dental USA, Inc.*, 2007 WL 901641, at *2 (Del. Super. Mar. 20, 2007); *Hedenberg v. Raber,* 2004 WL 2191164, at *1 (Del. Super. Aug. 20, 2004).

the Delaware Courts.[6] Under this test, a party must satisfy three elements to establish mutual mistake: (1) both parties were mistaken as to a basic assumption; (2) the mistake materially affects the agreed-upon exchange of performances; and (3) the party adversely affected did not assume the risk of the mistake.[7] The mistake "must be as to a fact which enters into, and forms the very basis of, the contract; it must be of the essence of the agreement, the *sine qua non* or, as it is sometimes expressed, the efficient cause of the agreement."[8]

At the moment the Court must assume that both parties were unaware of the calculation errors in the Chancery Court's opinion and the appraisal figures contained in that opinion were used by the parties as the basis for their subsequent agreement. The Defendant does not argue or even suggest that the final settlement number was derived from some other source nor can they make any credible argument that the Chancery calculations were not the central premise upon which the settlement agreement was built. The Defendant attempts to get beyond this obvious premise by suggesting that also critical to the agreement was their willingness to waive their appellate rights and thus suggests the settlement agreement was more than the payment of money. While the Court agrees that the agreement had other provisions,

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[6] *Progressive Int'l Corp. v. E.I. DuPont de Nemours & Co., et al.*, 2002 WL 1558382, at *6 (Del. Ch. July 9, 2002); *Wilson v. Pepper*, 1989 WL 268077, at *4 (Del. Ch. Dec. 21, 1989).
[7] RESTATEMENT (SECOND) OF CONTRACTS § 152: MISTAKE (2009).
[8] *Fed. Land Bank of Baltimore v. Pusey,* 1986 WL 9041, at *3 (Del. Super. July 21, 1986)(citing 54 AM.JUR.2D, MISTAKE, ACCIDENT, OR SURPRISE § 4 (1971)).

it is clear to the Court they were ancillary to the payment of over 47 million dollars by the Plaintiff. To argue that the waiver of appellate rights should have equal status and the calculation mistake was not material to the agreed upon exchange is simply legally created fiction. No reasonably represented party would pay 47 million dollars and then continue to battle the issue in the appellate court. This was simply the logical conclusion and requirement of the monetary settlement. As such, the Court finds that the Plaintiff has established the first two requirements for mutual mistake.

As to the third factor, the Restatement describes three scenarios in which a party is said to have assumed the risk of a mistake: (I) the contract expressly assigns the risk to that party; (ii) the mistaken party undertook to perform under a contract aware that his knowledge was limited with respect to the facts to which the mistake relates; or (iii) the court finds that it is reasonable to assign the risk to the party seeking rescission.[9]

The first scenario is simply not applicable since there is no expressed contractual assignment of the risk to either party. Under the second scenario where a contracting party is aware that he has limited knowledge as to the mistaken fact, but goes forward with the contract nonetheless, he may be deemed to have assumed the risk of the mistake due to his conscious ignorance.[10] In determining whether a party

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[9] RESTATEMENT (SECOND) OF CONTRACTS §154 (2009).
[10] *Lang v. Koziarz*, 1987 WL 15554, at *6 (Del. Ch. Aug. 11, 1987) (citing Restatement (Second) of Contracts § 154(b), cmt. c (1981)).

assumed the risk of a mistake by way of conscious ignorance depends upon whether the party seeking rescission took steps to avoid the mistake.[11]

In *Lang v. Koziarz*, 1987 WL 15554 (Del. Ch. Aug. 11, 1987) the Court found no assumption of risk by conscious ignorance because plaintiffs had conducted various tests prior to entering an agreement to purchase land. The Court noted that had the parties believed that the land would pass the necessary test and, based on that belief, the plaintiffs went to settlement for the land without having the necessary test performed, then it would be appropriate to rule that the plaintiffs had agreed to bear the risk of the mistake.[12]

Similar to the plaintiffs in *Lang*, Bottling took reasonable business steps prior to entering into the final agreement. Bottling forwarded Chancery's opinion to their financial expert, Houlihan Lokey Howard & Zukin Financial Advisors, Inc. ("Houlihan") to review the Chancery Court's calculations which would eventually form the basis of the Settlement Agreement. They were advised by their experts that the calculation appeared correct and relied upon that advice to negotiate the settlement. Therefore, it cannot be concluded that Bottling assumed the risk by entering in the Settlement Agreement because Bottling took reasonable steps prior to signing the Settlement Agreement to ensure accuracy.

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[11] *Id.*
[12] *Id.* (citing Restatement (Second) of Contracts § 154, cmt. b (1981)).

Under the third scenario of assumption of risk, a court may find that the party assumed the risk and allocated such risk to the party on the ground that it is reasonable to do so.[13]

Defendants cite to *Johnson v. Cullen*, 1997 WL 33177173 (Del. Ch. Mar. 12, 1997) to show that "a settling party assumes the risk of an error in a pre-settlement ruling" because "parties settle cases to avoid the risks of litigation." In that case, the court concluded that the settlement was found valid even though parties were unaware that the court had granted a motion to dismiss.[14] Under the circumstances, it was reasonable to allocate defendants the risk because they "bore the risk by settling before their motion to dismiss was decided."[15]

However, *Johnson* is different from the case at bar. *Johnson* shows assumption of risk in settling a claim *prior* to a court's ruling. In the present case, the Settlement Agreement came subsequent to the court's ruling. Bottling did not enter into the Settlement Agreement prior to the Chancery's opinion, but only after Chancery rendered its opinion and only after the numbers of the opinion were independently verified. The Settlement Agreement was not entered into in order to avoid the risks of litigation but to memorialize the Chancery Court's calculations and opinion. As such, this Court finds it unreasonable to assign the risk to Bottling.

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[13] RESTATEMENT (SECOND) OF CONTRACTS § 154 cmt. d (2009).
[14] *Johnson v. Cullen*, 1997 WL 33177173, at *1 (Del. Ch. Mar. 12, 1997).
[15] *Id.*

Read in a light favorable to Bottling, the Complaint sufficiently states a claim based on mutual mistake.

B. Unilateral Mistake

In addressing an unilateral mistake claim, a party must show: (1) enforcement of the agreement would be unconscionable; (2) the mistake relates to the substance of the consideration; (3) the mistake occurred regardless of the exercise of ordinary care; and (4) it is possible to place the other party in the *status quo ante*.[16] For many of the same reasons set forth in the discussion above regarding mutual mistake, the Court finds the Defendant's motion as to this issue must also be denied.

Defendants argue that unconscionability is comprised of both procedural and substantive unconscionability. However, the traditional test used for unconscionability is: "such as no man in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept, on the other."[17] An unconscionable contract is one that no rational or reasonable person would enter.[18] Based on this test and accepting the allegations in the complaint as true, the Court finds it difficult to find that a reasonable party would contract to overpay another party

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[16] *See Aetna Casualty and Surety Co. v. LaFazia, et al.*, 1982 WL 117015 (Del. Ch. Nov. 3, 1982). Crescent argues that a claim for unilateral mistake contains five elements, the fifth element being assumption of risk. This Court believes that only the first four elements mentioned above are those needed to satisfy such a claim. However, even if the assumption of risk element was included as part of the test for unilateral mistake, that element is still satisfied for the reasons set forth under mutual mistake.

[17] *Tulowitzki v. Atlantic Richfield Co.*, 396 A.2d 956, 960 (Del. 1978) (citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (1965)).

[18] *Ryan v. Weiner*, 610 A.2d 1377, 1382 (Del. Ch. 1992).

$3.3 million dollars more than the actual value of the item received. In a similar case regarding an appraisal award and overpayment, the Supreme Court of Delaware also concluded that enforcing the contract compelling the overpayment would be unconscionable.[19] Moreover, pursuant to 8 *Del. C.* §262, Defendants are only entitled to the *fair value* determined by the Court[20], not an inflated value based on miscalculations.

The second argument that the mistake relates to the substance of the consideration is not disputable. The mistake here relates to the critical monetary calculation that forms the basis of the settlement agreement. It is difficult to imagine a more central and critical mistake that goes to the heart of the agreement than those present here. It is also difficult to dispute that Bottling exercised reasonable care in its review of the Chancery Court's decision. Bottling forwarded a copy of Chancery's appraisal opinion to Houlihan, its expert, and asked Houlihan to verify that the Court correctly calculated the appraisal value prior to entering into the Settlement Agreement.[21] Houlihan verified the numbers and informed Bottling that it had reviewed the appraisal opinion and that there were no material errors in the Court's calculations.[22] By doing this, it appears to the Court that Bottling exercised ordinary

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[19] *ENSTAR*, 604 A.2d at 413.
[20] 8 *Del. C.* § 262(a) ("Any stockholder of a corporation...shall be entitled to an appraisal by the Court of Chancery of the *fair value* of the stockholder's shares of stock..."(emphasis added)); Compl. ¶ 55.
[21] Compl. ¶ 26.
[22] Compl. ¶ 27.

care by relying on experts to verify the accuracy of Chancery's calculations prior to entering into the Settlement Agreement.

Finally, Crescent argues that prior to the Settlement Agreement, Crescent had appellate rights in both the appraisal and fiduciary duty actions. However, pursuant to the Settlement Agreement, Crescent lost those rights to appeal and those rights cannot be restored. Therefore, it now asserts that it is impossible to return to the pre-settlement status quo.

Although Crescent is correct that these rights to appeal cannot be restored because of the passage of time, the arguments as to whether either party would have appealed Chancery's opinions are speculative at best. The complaint here asserts that Crescent had decided not to appeal prior to the parties discussing the actual amount of settlement.[23] Assuming the allegations of the complaint are true, it appears the status quo prior to the settlement could be obtained.

Based upon the above and read in a light favorable to Bottling, the Complaint sufficiently states a claim based on unilateral mistake.

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[23] Compl. ¶ 29.

C. Unjust Enrichment

Since at the moment there is a contractual document governing the relationship between the parties, the equitable claim of unjust enrichment is simply not available to the Plaintiff and therefore this claim will be dismissed.[24]

Conclusion

For the foregoing reasons, the Defendants' Motion to Dismiss is DENIED as to the mutual mistake and unilateral mistake claims and GRANTED as to the unjust enrichment claim.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[24] *Segovia v. Equities First Holdings, LLC,* 2008 WL 2251218, at * 21 *(*Del. Super. May 30, 2008); *ID Biomed. Corp. v. TM Techs., Inc.*, 1995 WL 130743, at * 15 (Del. Ch. Mar. 16, 1995) (dismissing unjust enrichment claim where "[i]t is undisputed the Letter Agreement governs the parties' relationship").